SOLID GOLD PUBLISHERS SDN BHD

v.

CHAN WEE HO & ORS (NO 2)

HIGH COURT MALAYA, MELAKA
SURIYADI HALIM OMAR J
[CIVIL SUIT NO: 22-78-1996]
21 JULY 1998

CIVIL PROCEDURE: *Discontinuance - Whether discontinuance effective - Meaning and effect of discontinuance - Conditions necessary for discontinuance without leave - Whether pending appeal prevents discontinuance from taking effect - Whether notice of discontinuance affected whole action or part of action only*

CIVIL PROCEDURE: *Summons-in-chambers - Withdrawal - Whether leave of court necessary to withdraw summons-in-chambers - Rules of the High Court 1980, O. 21 r. 6*

The plaintiff filed a statement of claim against the defendants for certain issues relating to copyright matters. A defence was filed but not served. The plaintiff subsequently filed and obtained an Anton Piller order against the defendants. The fourth, fifth and sixth defendants then applied to set aside the Anton Piller order and were successful (order dated 7 May 1998). The plaintiff appealed against the order dated 7 May 1998 and at the same time filed this application by way of summons-in-chambers to stay the execution of the order dated 7 May 1998. At the hearing date of the stay of execution, counsel for the defendants posed a preliminary objection on the basis that he received a notice of discontinuance which contained the desire of the plaintiff to totally discontinue the action. It was in evidence that the notice of discontinuance was filed before the filing of the application to set aside the order dated 7 May 1998. Based on the notice of discontinuance, counsel for the defendants submitted that such notice was effective on the whole action and that the matter has come to an end. The plaintiff, on the other hand, submitted that the notice of discontinuance was not intended to discontinue the whole action but was merely a notice to withdraw the application to set aside the order dated 7 May 1998. Further, the plaintiff contended that as an appeal against the order dated 7 May 1998 was pending, the discontinuance cannot be accepted.

The issues for consideration were: (i) the effect of the notice of discontinuance; and (ii) whether the whole action was discontinued or whether the notice only affected the application to stay the execution of the order dated 7 May 1998.

Held:

[1] Discontinuance in the High Court is when the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant, before any step had been taken in the action subsequent to the statement of defence, or at any other time by order of the court or a judge. The effect of discontinuance is to remove the plaintiff from the proceedings and hence to determine it. The notice of discontinuance must be clear and unambiguous, stating in unequivocal terms that the action is fully discontinued or that a particular claim is being withdrawn.

[2] Although discontinuance shall not be later than 14 days after service of the defence, if the defence has not been served, as in the current case, the plaintiff has an unqualified right to discontinue.

[3] The contents of the notice to discontinue in this case were clear, unambiguous and states in unequivocal terms that the action was wholly discontinued. The plaintiff cannot claim that the notice of discontinuance was merely a withdrawal notice for the application to set aside the order dated 7 May 1998 because to do so, pursuant to O. 21 r. 6 of the Rules of the High Court 1980, leave would have to be obtained first. Here, the plaintiff had acted unilaterally by sending a notice of discontinuance without consulting with the defendants and without obtaining leave from the court.

[4] Based on the notice filed by the plaintiff, it was clear that what was discontinued was not only the application to stay the execution of the order dated 7 May 1998 but the whole action. As a result, there effectively was no interlocutory application left for the court to consider.

[5] A pending appeal does not prevent the acceptance of a discontinuance because, by its definition, a discontinuance is a final termination of the whole action which means no part of the action survives an effective discontinuance.

[6] The relevant provision relating to the withdrawal of a summons-in-chambers is O. 21 r. 6 of the Rules of the High Court 1980 where the term 'summons' applies to a summons-in-chambers as well. This would mean that leave of the court is necessary for the withdrawal of a summons-in-chambers.

[Preliminary objection upheld; application dismissed.]

Case(s) referred to:

Conybeare v. Lewis [1879-80] 13 Ch D 469 ***(refd)***
Johnson v. Refuge Assurance Co Ltd [1913] 1 KB 259 ***(cit)***
Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors [1976] 1 MLJ 35 ***(refd)***
Re Busfield, Whaley v. Busfield [1886] 32 Ch D 123 ***(cit)***
Re Mysore West Gold Mining Co [1889] 42 Ch D 535 ***(cit)***
Re Wilson, AG v. Woodall [1980] 45 Ch D 266 ***(cit)***
Tan Eng Hoe v. Liang Hooi Kiang [1961] MLJ 119 ***(refd)***
The Saxicava [1924] P 131 ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 3
Rules of the High Court 1980, O. 5 r. 1, O. 21 rr. 2(4), 3, 6, O. 26 r. 1, O. 63 r. 2(5)

Other source(s) referred to:

Atkin's Court Forms, 2nd edn, p 7
Civil Procedure, Jeffrey Pinsler, pp 389-394
Janab's Key to Civil Procedure in Malaysia and Singapore, Hamid Sultan Abu Backer
Stroud's Judicial Dictionary, 3rd edn, p 1754
The Dictionary of English Law, Earl Jowitt, p 637
The Malaysian Court Practice, p 809
The Supreme Court Practice, 1997, vol 1, p 379

For the plaintiff - SS Gill; M/s SS Gill & Partners
For the 4th, 5th & 6th defendants - WS Goh; M/s WS Goh & Assoc

Reported by Mariette Peters-Goh & S Dharmendran

JUDGMENT

Suriyadi Halim Omar J:

On 17 October 1996 the plaintiff filed GS No. 22-78-1996 against Chan Wee Ho (1st defendant), Wah Guan Ching (2nd defendant), Wah Swee (3rd defendant), Goh Siew Lay (4th defendant), Goh Kok Chye (5th defendant) and Goh Kok Su (6th defendant). Subsequently, an *ex parte* summons-in-chambers was filed by the plaintiff for an Anton Piller Order against all six defendants. I heard the case on 24 October 1996 and gave an order in terms to that application as against all six defendants. Being dissatisfied with that order, the 4th, 5th and 6th defendants subsequently filed an application to have it set aside. Having heard it on 7 May 1998, 1 acquiesced to it but only in relation to the 4th, 5th and 6th defendants only. Defendants 1, 2 and 3 for some reason or other never took steps to set that Anton Piller Order aside and thus it remains good as against them.

After my setting aside of that Anton Piller Order, as against the three defendants, counsel for the plaintiff filed an appeal in the Court of Appeal on 4 June 1998. Apart from that pro-active action, the latter also filed encl. 57, but still alluding to the reference number of GS 22-78-96. This enclosure in essence was an application to suspend the execution of my setting aside order which I had pronounced on 7 May 1998. I did not go far with the hearing of this application, as the learned counsel for the three defendants posed a preliminary objection, on the platform that the plaintiff had discontinued all actions against them. In the court's file the relevant notice of discontinuance document is marked encl. 54.

The counsel for the defendants in introduction briefly submitted that as he had received the notice also on 15 May 1998, which contained the desire of the plaintiff to totally discontinue the action, then the matter would have ended there. The latter therefore would be prevented from pursuing the matter further. Scrutinising encl. 54, I was satisfied that the court received that notice on 20 May 1998 when it was filed in court. The plaintiff on the other hand disputed the view of the defendants and ventilated that it was not prevented from pursuing the pending application. Initially I failed to comprehensively understand his reasoning, but in spite of that, gave his view the widest of berth. This berth included the probable argument that I should not be side-tracked by mere semantics but to stick to the substance of the notice. At the conclusion of the hearing of the preliminary objection I indicated my total agreement with that objection and accordingly dismissed encl. 57 with costs.

To understand the legal issues at hand, apart from the consideration of the above facts supplied by the parties, I also had to take into account the defence which had been filed (encl. 49), in answer to the statement of claim filed for this GS No. 22-78-96 on 13 May 1998 (I have to consistently mention this reference number, to avoid confusion, as there are three other cases which are pending and which involve the same defendants and the same issues. They are GS 22-92-96, GS 22-93-96 and GS 22-94-96). To recapitulate:

1. the Anton Piller Order was pronounced on 24 October 1996;
2. the Anton Piller Order against the 4th, 5th and 6th defendants was set aside on 7 May 1998;
3. the defence was filed on 13 May 1998 but never served;
4. the unsealed copy of the notice of discontinuance was served on the 4th, 5th and 6th defendants on 15 May 1998 (therefore before the defence was filed);
5. the notice of discontinuance was filed in court on 20 May 1998.

6. the *ex parte* summons-in-chambers to stay the setting aside order (encl. 57) was filed on 23 May 1998; and

7. an appeal was filed as against my order of setting aside on 4 June 1998.

As there was nothing in the court's file which could indicate that the defence had been served on the plaintiff, I therefore had to conclude that it was yet to be served eventhough it had been filed. Perusing the above relevant documents, it was conspicuous that the notice of discontinuance was filed much earlier than the application to set aside my 7 May 1998 order (encl. 57). That notice similarly was filed much earlier than the date of the filing of the notice of appeal at the Court of Appeal. With all those facts stacked against the plaintiff, the only escape route left to take to avoid the disastrous repercussion of its notice of discontinuance, was to proceed on a legal premise or apply to expunge that notice of discontinuance. As the latter course of action was not undertaken, the plaintiff therefore was left only with the first alternative.

During the course of the trial, counsel for the plaintiff when questioned, agreed that that notice was intended to discontinue GS 22-78-96. To have a better insight of what did happen in court I reproduce the relevant notes of proceeding:

Court: Your action as per enclosure 3 (exparte Summons-In-Chambers for the Anton Piller Order) emanated from GS 22-78-96 itself?

Gill: I agree that the source of my Summons-In-Chambers is the writ itself.

Court: You have discontinued the writ of 22-78-96

Gill: Yes

Court: If you have discontinued the writ of 22-78-96 then what is the leg you are standing on?

Discontinuance in the High Court is when the plaintiff in an action voluntarily puts an end to it, either by giving notice in writing to the defendant, before any step has been taken in the action subsequent to the statement of defence, or at any other time by order of the court or a nudge (*The Dictionary of English Law* Earl Jowitt p. 637; Civil Procedure Jeffrey Pinsler pp. 389-394; see also *Janab's Key to Civil Procedure in Malaysia and Singapore* by Hamid Sultan bin Abu Backer). The effect of discontinuance no doubt is to remove the plaintiff from the proceeding and hence determine it (see remarks of Bankes LJ at p. 135 in *(The Saxicava)* [1924] p. 131).

The conditions that must prevail that govern the right of the plaintiff to discontinue without leave of the court are these:

1. that the action of the plaintiff was begun by writ;

2. if a defence has been filed, discontinuance shall not be later than 14 days after service of the defence on the plaintiff;

3. if there are two or more defendants a notice in Form 36 will be served on them, being not later than 14 days of the last defence served on the plaintiff; and

4. all notices of discontinuance must be in writing except with the leave of the court (O. 63 r. 2(5) Rules of the High Court 1980; *Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors (infra))*

I would interpret it that if the defence has not been served on the plaintiff, as in the current case, thus not encumbered by the 14 days rule, the strict consideration of the prescribed time does not arise, and the plaintiff is free to discontinue without being hindered by any shackling rules. His right therefore is unqualified here. Regardless of that, the notice must be clear and unambiguous, stating in unequivocal terms that the action is fully discontinued or that a particular claim is being withdrawn etc. (*Atkin's Court Forms* 2nd edn. 15 Lord Evershed p. 7). If all the parties to an action consent, the action may be discontinued without the leave of the court at any time before trial, by producing to the registrar a written consent, signed by all the parties. This legal premise is found under sub-r. (4) r. 2 of O. 21 of the Rules of the High Court 1980. Except as provided by that sub-rule, no party may discontinue an action or counterclaim, or withdraw any particular claim unless leave has first been obtained from the court.

I now clarify based on the facts, why I acquiesced to the preliminary objection of the defendant's counsel. To understand his argument it is necessary to reproduce in total the relevant notice of discontinuance which reads:

DI MAHKAMAH TINGGI MALAYA DI MELAKA
NEGERI MELAKA
GUAMAN SIBIL NO. 22-78-1996

Diantara

SOLID GOLD PUBLISHERS SDN BHD
(berniaga bagi diri sendiri. dan
juga bagi pihak Cineart
Enterprise Sdn. Bhd.) ... Plaintif

Dan

1. CHAN WEE HO
(berniaga sebagai New
Memory Video Enterprise)

2. WA GUAN CHING
WA SWEE
(kedua-dua berniaga perkongsian sebagai Bertam Jaya Video Centre)
4. GOH SIEW LAY
5. GOH KOK CHAI
6. GOH KOK SU
(ketiga-tiga berniaga perkongsian sebagai Jia Xin Laser Disc Video Services Centre)

... Defendan-defendan

NOTIS PEMBERHENTIAN

AMBIL PERHATIAN bahawa Plaintif sama sekali merberhentikan tindakan ini terhadap Defendan keempat, kelima dan keenam oleh kerana Writ Saman bertarikh l0hb Disember 1996 dan Pernyataan Tuntutan bertarikh 7hb Disember 1996 dalam Guaman Sibil 22-94-96 bagi kausa tindakan yang sama telah diserah kepada Peguamcara Defendan-Defendan pada 10 hb Mac 1997.

Bertarikh pada 15 haribulan Mei 1998.

t.t.
Peguamcara bagi Plaintif

Kepada:

1. Penolong Kanan Pendaftar Mahkamah Tinggi Malaya Melaka.
2. Tetuan W.S. Goh & Associates
173 B, Taman Melaka Raya,
75000 Melaka.

Notis Pemberhentian ini difailkan oleh Tetuan S.S. Gill & Partners yang beralamat di Wisma Solid Gold, Lot, 17, Jalan Cempaka SD 12/5, Bandar Sri Damansara, 52200 Kuala Lumpur, Tel No: 603-6345979, Fax No: 603-6342909.

A scrutiny of the contents of the above notice will prove beyond any doubts that the contents are clear and unambiguous, stating in unequivocal terms that the action was wholly discontinued. The notice which was in writing, in crystal clear terms showed that:

1. the notice of discontinuance was in regard to GS No. 22-78-96 as indicated at the top portion of the notice;
2. the heading speaks of "Notis Pemberhentian" meaning "Notice of Discontinuance";
3. it specified that the plaintiff discontinued the whole of the action completely as against defendants 4, 5 and 6;

4. a reason, though unnecessary, was offered for the withdrawal in that, another civil action referred to as GS 22-94-96 had been filed as against them;

5. the notice of discontinuance was dated 15 May 1998 and had been signed by the solicitors for the plaintiff;

6. a copy of the notice of discontinuance had been received by the court as per encl. 54; and

7. a copy of the notice of discontinuance was served on the solicitors of the three defendants. This fact was acknowledged in court.

A factor which I could ill afford to ignore was the fact that the notice was in Malay and not in the English language. The words used were "Notis Pemberhentian". Having done some research I was satisfied that "Notis Pemberhentian" meant "Notice of Discontinuance" as opposed to "Notis Penarikan" which meant "Notice of Withdrawal". It is not uncommon for solicitors or litigants to interchangeably use the words "discontinuance" and "withdrawal" rather loosely, and in the process may cause confusion to the relevant parties. *Atkin's Court Forms (supra)* at p. 5, regarding these terminologies had this to say:

> The terms are sometimes loosely used interchangeably, but in strictness the term "discontinuance" should more properly be applied to the procedure by which a plaintiff or defendant may unilaterally abandon the whole of his action or counterclaim, with or without leave, whereas the term "withdrawal" should more properly be applied to the voluntary abandonment of part of an action or counterclaim or to the whole or part of the defence or particular steps taken in proceedings.

The plaintiff cannot now come forward and claim that encl. 54 was a withdrawal notice for the *ex parte* summons-in-chambers and not the whole action. The evidence and the inferences will certainly fly against such an assertion. To begin with, the plaintiff's counsel in court had conceded to be that he had discontinued the whole action rather then limiting it to that *ex parte* summons-in-chambers. In the event the suppositions of his assertion that the notice concerned the withdrawal of the *ex parte* summons-in-chambers, and nothing more, surely then he would have had to obtain leave first. This requirement is provided for under O. 21 r. 6 of the Rules of the High Court 1980, and it reads:

> A party who has taken out a summons in a cause or matter may not withdraw it without the leave of the Court.

The relevant consequential questions to be considered are:

1. does the summons-in-chambers in this case come within the ambit of O. 21 r. 6 of the Rules of the High Court 1980 or O. 21 r. 2; and

2. as no leave was applied for, what inference could the court arrive at?

To resolve these relevant questions I will answer the second question first. If he had merely wanted to withdraw the *ex parte* summons-in-chambers, applying for that registrar's court's leave would have been the first thought that should have crossed his mind. Here the plaintiff had acted unilaterally by sending a notice of discontinuance, without prior consultation of the defendant, or obtaining the necessary leave from the court. In the event the summons-in-chambers come within the ambit of O. 21 r. 6, where the court's leave is required for its withdrawal, regardless of the circumstances, for purposes of this case, it must be inferred that he intended to withdraw the whole writ.

I now return to the first question. Under O. 5 r. 1 of the Rules of the High Court, subject to the provisions of any written law and of these rules, civil proceedings in the High Court are begun by writ, originating summons, originating motion or petition. If a plaintiff has begun his action by a writ, and thereafter wishes it to be discontinued, then O. 21 r. 2 is important (this provision is inapplicable for probate cases). Under O. 21 r. 3, whenever a party has begun an action, whether by writ or otherwise, that party may not discontinue an action, a counterclaim or withdraw any particular claim made by him therein, unless owed by the court. As regards the withdrawal of part of the "action", "suit" or "claim" by the plaintiff, loosely termed a partial discontinuance, the relevant provisions will be that of rr. 2 and 3.

By the above delienation, an originating summons may not be discontinued via the conduit of O. 21 r. 2 (see case of In *Re Busfield, Whaley v. Busfield. (infra))*, though a writ may be discontinued under O. 21 r. 3. Reading O. 21 r. 2 and r 3, interestingly enough, both these provisions speak of "an action". Does a summons-in-chambers come within the ambit of O. 21 r. 2 and r. 3? I believe not. The subsequent dissertation will explain this paragraph.

It is unfortunate that for purposes of O. 21 r. 6, the relevant interpretation of "summons" and "in a cause or matter", are not supplied by the Legislature within the Rules of the High Court itself. On that premise I had to resort to the Courts of Judicature Act 1964 for assistance, but, as expected, failed to find the meaning of "summons" except for these subsequent words found under s. 3. They read:

> "action" means a civil proceeding commenced by writ or in such other manner as is prescribed by rules of court, but does not include a criminal proceeding;
>
> "cause" includes any action, suit or other original proceeding between a plaintiff and defendant, and any criminal proceeding; ...
>
> "matter" includes every proceeding in court not in a cause;

(See also *Stroud's Judicial Dictionary Third* edn. p. 1754 and p. 1640 in the fourth edn. for interpretation of "matter"; In *Re Mysore West Gold Mining Company* [1889] 42 Ch. D 535). Perusing the meaning of "action" as provided for by the Courts of Judicature Act 1964 I am satisfied that a summons-in-chambers is an action in a civil proceeding. This is so as the term "action" must be intended to include in any civil proceeding the existence of a plaintiff who litigates and a defendant who is being litigated in respect of some cause of action (*Johnson v. Refuge Assurance Company, Limited*. [1913] 1 KB 259). But clearly a summons-in-chambers does not qualify as a writ, as that interlocutory application was never commenced by writ, nor intended to come under that heading. The term "writ" must be accorded a limited meaning and is exhaustive. On that construction, the action of the *ex parte* summons-in-chambers would fall under the phrase of "or in such other manner as is prescribed by rules of court" as provided for by s. 3 of the abovementioned Courts of Judicature Act 1964. There are many other examples of causes of action that do not qualify as an action commenced by writ, but suffice if I merely state that an originating summons though an action, does not fall within that definition (In *Re Busfield. Whaley v. Busfield* [1886] 32 Ch. D 123; In *Re Wilson Attorney-General v. Woodal* [1890] 45 Ch D 266).

By the above analogy and prognosis of the law, it can be satisfactorily enunciated that as a summons-in-chambers cannot qualify as an action that falls within the ambit of O. 21 r. 2, then it must fall within the purview of O. 21 r. 6. *The Malaysian Court Practise* at p. 809, regarding O. 21 r. 6, has this to say:

> This rule refers to an ordinary summons which has been duly issued in a cause or matter and the same can only be withdrawn with the leave of the court. If the summons has not been served or it has been served and the other party consents in writing to withdrawal, the application for withdrawal should be made *ex parte* to the registrar by submitting the sealed copy of the summons together with the written consent. If leave is granted, as it would usually be granted, the registrar will endorse his leave on the summons.

Scrutinising the above statement, the author has construed the summons under O. 21 r. 6 as an ordinary summons. Perusing the principal O. 21 as a whole, the words "action", "claim", "defence" and "counterclaim" in this order, stick out rather prominently and certainly do not relate to any ordinary summons. In consonant with my rejection of the terminology of "summons" of O. 21 r. 6, to mean "writ of summons", then any withdrawal of any such summons must be in strict compliance of this very rule. As said earlier, regardless of the circumstances, prior leave from the court is a must, the lowest level being that of the registrar's. Why leave is required under this provision is not for me to seriously conjecture. Suffice if I may opine that by the advent of such

an interlocutory application, the respondent in law, and by sheer necessity will be prejudiced. Not only will his time or money be expended thenceforth, but his reputation may necessarily be put to the test. Recognising the predicament of that respondent, and for no fault of his, parliament must have intended to compensate the former, or even prevent applicants from proceeding with frivolous and or vexatious applications. Ong J on behalf of the Court of Appeal in *Tan Eng Hoe v. Liang Hooi Kiang* [1961] 27 MLJ 119 in ringing terms said:

> As to discontinuance, it is again well settled that it lies entirely within the Judge's discretion whether or not to allow a plaintiff to discontinue with the right of bringing another action. The object of Order 26 rule 1 is that "after the proceedings have reached a certain stage the plaintiff, who has brought his adversary into Court, shall not be able to escape by a side door and avoid the contest ... and it is for the Judge to say whether the action shall be discontinued or not and upon what terms" (per Chitty L.J. in *Fox v. Star Newspaper Co*.).

To put the final touches on r. 6 of O. 21, the *Supreme Court Practice* 1997(1) at p. 384 had this to say:

> This rule was taken from R.S.C. (Rev.) 1962, O. 21 r. 6, which was new but it embodied the previous practice. If the summons has not been served, leave to withdraw it may be obtained *ex parte* from the Practice Master who will endorse his leave on the summons. If the summons has been served, and the other party consents, leave to withdraw may also be obtained *ex parte* from the Practice Master; but if the consent of the other party is not obtained or is refused, leave to withdraw may be sought only at the hearing of the summons, when the Master will deal with the costs occasioned thereby.

The above enunciation again reflects the strict treatment accorded to applicants by courts, whenever they wish to withdraw. For writs or other forms of action which do not fall within this category, when and where the plaintiff wishes to discontinue by consent, O. 21 r. 2(4) is relevant.

In the case of *Khoo Chin Inn & Anor v. Reliance Enterprise Sdn. Bhd. & Ors*. [1976] 1 MLJ 35, the plaintiff had received the defence but had not taken any other proceedings in the action except for an interlocutory application, ie, a summons-in-chambers, to restrain the defendants from acting as directors of the first defendant company (similar type of procedural action as in the current case). Before the summons-in-chambers could be heard, the plaintiff discontinued the whole action ie, the writ of summons. Ajaib Singh J. at p. 37 para. E-G left said:

> The condition under which the plaintiffs could discontinue without leave of the court had been satisfied, namely, that after receipt of defence the plaintiffs had not taken any other proceeding in the action *except for the interlocutory*

application of January 23, 1975 which in any event did not affect their right to discontinue without leave. Leave of the court is necessary only where a plaintiff after receipt of defence takes any other proceeding in the action save any interlocutory application.) (emphasis mine)

The above case in comparison is more complicated, with it having reached a much more advanced stage, *vis-a-vis* the current case, as not only had the defence been served but was complemented by an interlocutory application. The redeeming feature was that the summons-in-chambers there was never proceeded with, as the action was wholly discontinued thereafter. In contra distinction to the present case, here no defence was served, but with the *ex parte* summons-in-chambers having been dealt with by me. To conclude on this legal poser, interpret the act of the plaintiff when removing the very foundation of the whole case as analogous to a gardener uprooting the whole tree, rather than dust merely trimming the branches for some good reason. By due comparison and analogy too, if Ajaib Singh J in *Khoo Chin Inn & Anor v. Reliance Enterprise Sdn Bhd & Ors (supra)* could permit the discontinuance of the whole action based on those prevailing facts, then the current case must submit to a similar result. The fact that the defence was not served on the plaintiff in the current case, and hence making the serving of the notice without prior obtaining of the leave possible, strengthened my finding that the whole action had been discontinued. Apart from that, alluding to the case of *The Saxicava (supra)*, if the Court of Appeal there had construed that the effect of a discontinuance was to remove the plaintiff from the proceedings, then effectively no interlocutory application was left for me to consider. *The Supreme Court Practice* 1997(1) at p. 379, also in the same vein in crystal clear terms read:

The term "discontinuance" appears to be directed to the final termination of the whole action or counterclaim, so that no part of it survives an effective discontinuance ...

The scope of that statement is also sufficient answer to reject the contention of the plaintiff's counsel that as an appeal is pending before the Court of Appeal, I was therefore prevented from accepting the discontinuance. I felt doubly vindicated by the case of *Conybeare v. Lewis* [1879-80] Ch. D vol. 13 469 where Jessel M.R. at p. 470 said:

Notice to discontinue the action having been given, the appeal comes to an end, and we cannot make any other order than to strike it out of the paper.

Pursuant to all the above grounds I agreed with the preliminary objection and dismissed the application with costs.